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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 98-10316

UNITED STATES OF AMERICA,

Appellant,

v.

TUCOR INTERNATIONAL, INC., ET AL.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

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JURISDICTION

The defendants were indicted for violating section 1 of the Sherman Act, 15 U.S.C. 1. The district court had jurisdiction under 18 U.S.C. 3231. On June 15, 1998, the district court entered a final order (1) granting a writ of error coram nobis to set aside a guilty plea and vacate the conviction of Tucor Industries, Inc., and (2) granting a motion to dismiss the indictment as to four other defendants. The United States filed

a timely notice of appeal on July 14, 1998. This court has jurisdiction under 18 U.S.C. 3731 and 28 U.S.C. 1291.

BAIL STATUS

No defendant is in custody or on bail.

ISSUES PRESENTED

1. Whether the Shipping Act of 1984 provides an exemption from the antitrust laws for a conspiracy among motor carriers to fix prices for the foreign inland movement of goods being shipped under through rates to and from the United States.

2. Whether the district court properly construed the indictment as limited to "through transportation" shipments within the meaning of the Shipping Act.

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal ***.

Section 4(a) of the Shipping Act of 1984, 46 U.S.C. app. 1703(a), provides in relevant part:

> This chapter applies to agreements by or among ocean common carriers to--

(1) discuss, fix, or regulate transportation rates, including through rates, cargo space accommodations, and other conditions of service ***.

Section 5(a), 46 U.S.C. app. 1704(a), provides in relevant part:

A true copy of every agreement entered into with respect to an activity described in section 1703(a) or (b) of this title shall be filed with the Commission, except agreements related to transportation to be performed within or between foreign countries ***.

Section 7(a), 46 U.S.C. app. 1706(a), provides in relevant part:

The antitrust laws do not apply to--

(1) any agreement that has been filed under section 1704 of this title and is effective under section 1704(d) or section 1705 of this title, or is exempt under section 1715 of this title from any requirement of this chapter; [or]

***

(4) any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade;

***.

The full text of sections 2 through 7, and section 10, of the Shipping Act of 1984, 46 U.S.C. app. 1701-1706, and 1709, is set forth in an appendix to this brief.

FACTS

1. Procedural Background.

On September 9, 1992, the defendant motor carriers were indicted under section 1 of the Sherman Act, 15 U.S.C. 1, for fixing prices for the transportation in the

Philippines of household goods being shipped by the U.S. Department of Defense between the Philippines and the United States. On June 16, 1993, defendant Tucor Industries, Inc. ("Tucor," a Philippine corporation) entered a plea of guilty and was sentenced to a fine of $121,800.[1] The government was unable to secure personal jurisdiction over the remaining eight defendants, who were Philippine individuals and corporations, and they were never tried.

On August 15, 1997, Tucor filed a petition for a writ of error coram nobis (E.R. 10), and four other defendants (collectively "Luzon defendants")[2] applied for leave to make a special appearance in order to move to dismiss the indictment without submitting to the jurisdiction of the court (E.R. 39). Their primary argument was that the agreement for which they were indicted was immunized from the antitrust laws by the Shipping Act of 1984, 46 U.S.C. app. 1701 et seq. Over the government's opposition the court allowed the special appearance, and directed the government to respond to the petition on the merits (Order, October 20, 1997). The matter was

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[1] Pursuant to a plea agreement, the indictment was dismissed as to two related defendants (Tucor's U.S. parent and Dale Bailey, an officer). The indictment was also dismissed as to Patrick Boll, a Tucor officer, who had died.

[2] Luzon Moving & Storage Corp. and Philippine-American Moving & Storage Corp., and their owners/officers, George Schulze, Sr. and George Schulze, Jr.

argued on December 3, 1997, and on June 15, 1998, the district court entered an order granting Tucor's petition for a writ of error coram nobis, vacating its conviction, and granting the Luzon defendants' motion to dismiss (E.R. 72).

2. The Indictment.

The indictment concerns a price fixing conspiracy targeted at the U.S. Department of Defense ("DoD"), the U.S. freight forwarders that DoD used to ship the household goods of military personnel being transferred between bases in the United States and bases in the Philippines, and ultimately the U.S. taxpayers.

As set out in the indictment, DoD contracts with freight forwarders[3] in the United States for the transportation of household goods of military personnel and civilian employees between the United States and the Philippines (E.R. 6 ¶13). To provide such services the freight forwarders must be represented by agents in the Philippines, who provide booking, packing, and inland transportation services on their behalf (ibid.). The rates the forwarders charge to DoD, which have to cover the

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[3] A "freight forwarder" under the Interstate Commerce Act is a type of carrier that does not operate its own line-haul equipment, but specializes in consolidating freight from small shippers into truckload lots for transportation by motor carrier or railroad, and distributing them to the consignees at the destination. See Chicago, M., St. P. & Pac. R.R. v. Acme Fast Freight, Inc., 336 U.S. 465, 467-68 (1949).

forwarders' payments to their Philippine agents, are set by competitive bidding every six months (id. at ¶14).

The offense charged in the indictment is that from October 1990 to at least March 1991 the defendants conspired among themselves to increase the prices that they would charge the U.S. freight forwarders for their services as agents in the Philippines (E.R. 2 ¶¶2-3). The conspiracy caused all but the two forwarders with the highest rates on file to cancel their rates with DoD, thus foregoing any DoD business, and caused DoD to pay higher prices for the transportation of household goods between the United States and the Philippines (id. at ¶4). The indictment further alleged that the conspiracy was "in restraint of trade or commerce *** with foreign nations" within the meaning of section 1 of the Sherman Act because the billing documents from the defendants to the freight forwarders, the forwarders' payments to the conspirators, the supplies needed to provide the moving services, and the movement of military personnel, to which the defendants' moving services were essential, all occurred "in a continuous and uninterrupted flow of United States foreign commerce" (id. at ¶¶15-18). Finally, the indictment alleged that "[t]he business activities of the defendants and co-conspirators that are the subject of this indictment were within the flow of, and substantially affected, United States foreign trade and commerce" (id. at ¶19).

3. The Shipping Act of 1984.

The primary purpose of the Shipping Act of 1984 ("the Act"), like that of its predecessor in the international liner trades,[4] the Shipping Act, 1916 (former 46 U.S.C. 801 et seq.), is "to exempt from the antitrust laws those agreements and activities subject to regulation by the Federal Maritime Commission ['FMC']." H.R. Rep. No. 98-53, pt. 1, at 3 (1983). This substitution of regulation for antitrust enforcement is implemented primarily through four sections of the Act. Section 4 describes what agreements are within the scope of the Act; section 5 sets forth the filing requirements for such agreements; section 6 prescribes the action the FMC is to take on the agreements that are filed; and section 7 specifies what agreements are exempt from the antitrust laws and some that are not. 46 U.S.C. app. 1703-1706. These four provisions are supplemented by additional regulatory provisions applicable to both individual carriers and groups of carriers: section 8 requires the carriers to file tariffs for most services; section 9 prohibits "controlled carriers" from maintaining below-cost rates;

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[4] The carriers regulated under the Shipping Act are common carriers, a category that excludes "tramp" vessels and charter services. See, e.g., S. Rep. No. 98-3, at 19 (1983).

and section 10 specifies prohibited acts for carriers and related entities. 46 U.S.C. app. 1707-1709.

In section 3, 46 U.S.C. app. 1702, the Act specifically defines key terms used in those provisions. A "common carrier" is an entity that holds itself out to the general public to provide transportation by water, assuming responsibility for the transportation from point of receipt to the point of destination, and using a vessel on the high seas between a port in the United States and a port in a foreign country. Section 3(6). There are two kinds of common carriers. An "ocean common carrier" is one that actually operates vessels. Section 3(18). A "non-vessel operating common carrier" (or "NVO") assumes responsibility for the transportation, but does not operate the vessels by which the ocean transportation is provided, and is a shipper in relation to the vessel operating carrier.[5] Section 3(17).

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[5] An NVO performs the same functions as an inland freight forwarder (fn. 3, supra), except that it uses ocean common carriers. Caribbean Shippers Ass'n v. STB, 145 F.3d 1362, 1363 (D.C. Cir. 1998); New York Foreign Freight Forwarders & Brokers Ass'n v. ICC, 589 F.2d 696, 699-700 (D.C. Cir. 1978). These functions should not be confused with those of an "ocean freight forwarder," which, as defined in the Shipping Act, is a shipper's agent, not a carrier or shipper itself. See 46 U.S.C. app. 1702(19). The same entity, however, may be employed to perform any of these functions for different shipments.

Section 4 states that the Act applies to "agreements by or among ocean common carriers," and "agreements among *** marine terminal operators." No ocean common carriers or marine terminal operators are parties to the agreements alleged in this case.[6]

4. The Dispute Below.

Section 7(a) provides that: "[t]he antitrust laws do not apply to – (1) any agreement that has been filed under section 5 of this Act and is effective under section 5(d) or section 6 ***; [or] (4) any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade." 46 U.S.C. app. 1706(a). The defendants, relying on the language of section 7(a)(4) ("exemption (4)") standing by itself, argued that the Shipping Act exempted any agreement regarding the foreign inland segment of through transportation in a United States import or export trade, and that the indictment related solely to such transportation services (E.R. 23-25, 41).

The government responded that section 7(a) could not be read in isolation, but the statute had to be read as a whole. It pointed to section 4, entitled "Agreements

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[6] The only "common carriers" as defined in the Act with whom the defendants entered into agreements were the U.S. freight forwarder entities in their capacity as NVOs. NVO agreements are not within the scope of the Act as defined by section 4, and thus not entitled to antitrust immunity under section 7.

Within Scope of Act," which provides that the Act "applies to agreements by or among ocean common carriers to–(1) discuss, fix, or regulate transportation rates, including through rates ***." 46 U.S.C. app. 1703(a). Since there were no ocean common carrier parties to the agreement alleged, the government contended that the Act, and therefore the antitrust exemption provided by it, did not apply.[7] Moreover, it argued that the indictment was not limited to shipments carried by through transportation as defined in the Act.

5. The District Court Decision.

The district court accepted the defendants' Shipping Act arguments.[8] It recognized the principle that statutes must be construed as a whole (E.R. 81). It

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[7] The Federal Maritime Commission, the agency charged with enforcement and interpretation of the Shipping Act, agrees with the United States' construction of sections 4 through 7 of the Act, and the district court was informed of that fact. See E.R. 64.

[8] With respect to other issues raised by the defendants, the district court rejected Tucor's arguments that the government violated Tucor's Brady rights by failing to inform it of the potential Shipping Act defense (E.R. 105-06), and that the government engaged in selective prosecution by not indicting Greek companies engaged in the same conduct (E.R. 108-10). The court declined to decide the Luzon defendants' argument that the indictment was barred by a treaty between the United States and the Philippines (E.R. 99 n. 7). It stated that, in candor, the government should have brought the potential Shipping Act defense to the court's attention at the time of Tucor's guilty plea, despite the government's "defensible" and good faith belief that the exemption did not apply, but imposed no sanctions (E.R. 106-08).

thought, however, that the government's interpretation could not be accepted because it believed that interpretation would render both exemptions (3) and (4) meaningless. Moreover, it reasoned that if it could find any exemption under section 7(a) applicable to an agreement not involving an ocean common carrier, it would refute the government's central thesis that section 7 is limited by section 4 (id. at 84). Thus, the court first examined exemption (3), which applies to agreements relating to "transportation services within or between foreign countries,"[9] and found that it could not apply to "ocean common carrier" agreements, which under this Court's decision in Transpacific[10] must relate to the operation of vessels between a United States port and a foreign port (id. at 85-86). Similarly, it thought that ocean common carriers are required to file all of their agreements relating to through transportation, which are then immunized under exemption (1), that no such agreements would be left for exemption (4), and that exemption (4) must therefore apply to agreements by parties other than ocean common carriers (id. at 86). Finally, it deemed this broad interpretation of the

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[9] Under exemption (3), the antitrust laws do not apply to "any agreement or activity that relates to transportation services within or between foreign countries, whether or not via the United States, unless that agreement or activity has a direct, substantial, and reasonably foreseeable effect on the commerce of the United States." 46 U.S.C. app. 1706(a)(3).

[10] Transpacific Westbound Rate Agreement v. FMC, 951 F.2d 950 (9th Cir. 1991).

exemptions provided by sections 7(a)(3)-(4) to be confirmed by the language of section 7(b)(1), which explicitly withholds immunity from agreements "with or among" domestic inland carriers. The court reasoned that the phrase "or among" [such carriers] would be superfluous if immunity under the Act did not reach beyond ocean common carrier agreements (id. at 87-88). Thus, it concluded, the "plain meaning of the statute does not support limiting the scope of the section 7(a)(4) immunity to agreements of ocean common carriers" (id. at 88).

The court acknowledged committee reports in the legislative history stating that the language of section 4 was intended to define the scope of the antitrust immunity granted by section 7 (E.R. 89-90). In general, however, it found the legislative history inconclusive, although tilting in favor of the defendants and containing nothing in favor of the government's position sufficient to support a result "contrary to the plain meaning of the Act" (id. at 93-94).

The court also found that the conduct described in the indictment necessarily related to the foreign inland leg of through transportation within the scope of exemption (4).[11] It noted that the defendants' services were provided entirely within the

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[11] The "through transportation" in this case is that offered by the U.S. freight (continued...)

Philippines (E.R. 95-96). And it held that the government's "hypothetical situation," where the U.S. freight forwarders arranged the inland legs of the transportation but DoD separately arranged for the ocean segment, was not encompassed in the indictment (id. at 97-98).[12] It so held because the indictment alleged that the freight forwarders contracted to transport the shipments "between the Philippines and the United States," that "the moving services provided by the defendants were part of a 'continuous and uninterrupted flow of United States foreign commerce,'" and, most importantly, that the shipments were "transported *** under a Government Bill of Lading" (ibid.). The court referred to an affidavit submitted by a DoD official in response to earlier Tucor motions which showed that these were International Through

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(...continued)
forwarders acting as NVOs. The Act defines "through transportation" as "continuous transportation *** for which a through rate is assessed" and provided by one or more carriers, including at least one "common carrier," between a United States and a foreign point or port, and it defines a "through rate" as a "single amount charged by a common carrier in connection with through transportation." Sections 3(25)-(26), 46 U.S.C. app. 1702(25)-(26). Since an NVO is a "common carrier," it can establish a through transportation service simply by offering transportation under a single-factor rate between an inland point in the United States and an inland point overseas.

[12] It would not be "through transportation" if a freight forwarder provided only the two inland legs of the transportation, and the underlying shipper contracted directly with the ocean common carrier for the water portion. The forwarder would not be acting in the capacity of an NVO as defined in sections 3(6) and (17), nor would the shipper be assessed a single-factor "through rate" under sections 3(25)-(26).

Government Bills of Lading ("ITGBLs") and that the freight forwarders' bids included the foreign inland carriers' rates (ibid.). In the court's view, the use of ITGBLs excluded separate contracts for ocean carriage, and the fact that the freight forwarders included their Philippine agents' costs in their single-factor bids to DoD showed that the agents' services were a "segment of through transportation" within the meaning of exemption (4). Thus, the court reasoned, the indictment on its face showed that the defendants' conduct was within the exemption, and the motion to dismiss and the writ of coram nobis should be granted (E.R. 94-95, 104-05).

SUMMARY OF ARGUMENT

1. This Court reviews both the district court's construction of the Shipping Act and its interpretation of the indictment de novo.

2.a. The Shipping Act's plain language taken as a whole extends antitrust immunity only to agreements of ocean common carriers and marine terminal operators, and not to independent agreements among inland carriers not subject to regulation under the Act. Section 4 by its terms defines the agreements within the scope of the Act, and section 7(a) grants immunity to "agreements." Section 5(a) requires most agreements within the scope of section 4 to be filed for review by the FMC under section 6, and those agreements and activities colorably within their scope are given

immunity by sections 7(a)(1)-(2). Section 5(a), however, also excepts from the filing requirement ocean common carrier agreements "related to transportation to be performed within or between foreign countries," and sections 7(a)(3)-(5) immunize some of those unfiled agreements. Thus, the Act's language and structure plainly contemplate coverage of ocean common carrier agreements within the scope of section 4 under both the filing exception in section 5(a) and the antitrust exemptions in sections 7(a)(3)-(5). Moreover, contrary to the assumptions of the district court, such ocean common carrier agreements do exist.

b. The legislative history confirms this reading. Antitrust immunity under the 1916 Act had been limited to ocean carriers and marine terminal operators regulated by that Act, and the earliest versions of the bills leading up to the 1984 Act, in the 96th and 97th Congresses, explicitly tied antitrust immunity to defined agreements or regulated carrier status. The district court thought that it perceived an expansion of immunity to non-regulated entities in the Senate Commerce Committee's bill in the 97th Congress, but it erred.

Had the Committee contemplated such a fundamental change in policy from the 1916 Act and the earlier bills, it would have plainly said so. It did not. In addition, the Committee's insistence on the adequacy of Shipping Act remedies to protect against

abuses of the antitrust exemptions that it would grant is inconsistent with the free-standing immunity found by the district court.

Finally, the inference drawn by the district court is rebutted by two changes proposed by the House Judiciary Committee and adopted by Congress after the Senate Committee reported its bill. The first amended section 4 specifically "to indicate the scope of the Act for purposes of defining the breadth of the antitrust exemption set forth in Section 7." H.R. Rep. No. 97-611, pt. 2, at 31. As the authoritative Conference Report declares:

> [Section 4] states the coverage of the bill. It lists the type of agreements to which the bill applies. When read in connection with sections 5 and 7, the effect is to remove the listed agreements from the reach of the antitrust laws as defined in the bill.

H.R. Conf. Rep. No. 98-600, at 28 (1984). The second Judiciary Committee change was to bar antitrust immunity under section 7(a)(3) for agreements regarding transportation within and between foreign countries that have a "direct, substantial, and reasonably foreseeable effect" on United States commerce. H.R. Rep. No. 98-53, pt. 2, at 32-33 (1983). The adoption of that amendment demonstrated Congress's unwillingness to defer to principles of international comity where the interests of United States commerce may be directly and adversely affected. In light of those two changes,

the inference that Congress intended to grant an unconditional antitrust immunity to unregulated entities in a situation where a direct, adverse affect on United States commerce is inevitable, and that it did so purely on principles of comity, is unsupportable.

c. The policy of the Act to substitute regulation for antitrust immunity is clear. The persons drafting the Act were aware of the potential for abuse of unrestrained market power, and so included numerous provisions in the statute to regulate the ocean common carriers' use of their antitrust immunity. None of those protections for shippers, NVOs, and independent carriers applies to anticompetitive arrangements, even the most predatory, among non-ocean carriers like the defendants here. Extension of antitrust immunity to non-ocean carriers, therefore, would defeat the balance of interests that Congress intended.

3. The district court also seriously misconstrued the indictment as applying only to "through transportation" services within the meaning of the Shipping Act. The indictment alleges an across-the-board conspiracy to fix the prices "for moving services supplied in connection with the transportation of military shipments of household goods between the Philippines and the United States." Nothing in the section of the indictment describing the conspiracy limits it to through transportation.

The grounds on which the district court held the indictment limited to through transportation services cannot be supported. The use of International Through Government Bills of Lading does not automatically indicate through transportation within the meaning of the Shipping Act. Rather, the way in which such a bill of lading is used in a particular instance raises a factual issue that cannot be determined on the face of the indictment. In addition, even if a "continuous flow of commerce" allegation for purposes of Sherman Act jurisdiction could be equated with "through transportation" for Shipping Act purposes–and it cannot be–the "continuous flow" allegations in the jurisdictional section of the indictment do not refer to the transportation arrangements at issue, but to the movement of billing documents, payments, supplies, and personnel affected by the defendants' conspiracy. The allegation that defendants' business activities were "within the flow of, and substantially affected, United States foreign trade and commerce" plainly cannot be construed as limited to through transportation.

ARGUMENT

This criminal case is about a group of moving and storage firms engaged in transporting the household goods of U.S. military personnel and their dependents, who conspired to fix the prices for these services, thereby increasing their incomes at the

expense of DoD and, ultimately, of U.S. taxpayers. The government has routinely prosecuted similar conspiracies.[13] Although the defendants' price fixing in this case applied to the Philippine leg of DoD's U.S.-Philippines household goods shipping, the principle is the same. The rifle-shot precision with which the defendants aimed their price fixing at targets in the United States–indeed, at the United States government itself–not only brings their conduct comfortably within the jurisdictional reach of the Sherman Act, but also amply justifies our government's use of the criminal process to redress wrongs done to the United States. Quite unremarkably, when the defendants were found out and indicted in 1992, Tucor (which was operated by U.S. citizens) pleaded guilty, while the Luzon defendants (Philippine citizens) remained beyond the personal jurisdiction of the United States courts to try them.

The only remarkable thing about this case is that in 1998 – five years after Tucor's guilty plea–the district court agreed to reopen this dormant case and ruled that the defendants are immune from the antitrust laws because of a provision in the

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[13] A nationwide investigation of moving companies doing business with DoD in the mid-1980s gave rise to a number of indictments, although only a few reported decisions. See United States v. Ryans, 903 F.2d 731 (10th Cir.), cert. denied, 498 U.S. 855 (1990); United States v. Ashley Transfer & Storage Co., 858 F.2d 221 (4th Cir. 1988), cert. denied, 490 U.S. 1035 (1989); Coleman American Moving Services, Inc. v. Weinberger, 716 F.Supp. 1405 (M.D. Ala. 1989).

Shipping Act of 1984. This interpretation of the Shipping Act on its face violates the fundamental principles of statutory construction that antitrust exemptions are to be narrowly construed and that the antitrust exemptions in the Shipping Act are presumptively meant for parties who (unlike the defendants) are subject to regulation by the FMC in exchange for their exemption. Not surprisingly, the district court's ruling that Congress meant to bestow a free and free-floating antitrust immunity on the defendants is also inconsistent with the text of the statute read as a whole, with the legislative history, and with the stated legislative policy, all of which support the government's position.

A. Scope of Review

Both the construction of the Shipping Act and the interpretation of the indictment are issues that this Court reviews de novo. United States v. Doe, 136 F.3d 631, 634 (9th Cir. 1998) (statutory construction); United States v. Ruelas, 106 F.3d 1416, 1419 (9th Cir. 1997), cert. denied, 117 S.Ct. 2470 (1997) (indictment); United States v. Boone, 951 F.2d 1526, 1542 (9th Cir. 1991) (indictment).

B. The Shipping Act Exemption From the Antitrust Laws Is Limited to Ocean Common Carrier and Marine Terminal Agreements Within the Scope of Section 4.

The Sherman Act plainly reaches the conspiracy alleged in the indictment. "[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effects in the United States." Hartford Fire Insur. Co. v. California, 509 U.S. 764, 796 (1993). Accord, Metro Industries, Inc. v. Sammi Corp, 82 F. 3d 839, 847 (9th Cir. 1996), cert. denied, 117 S.Ct. 181 (1996). That rule applies in criminal as well as civil cases. United States v. Nippon Paper Industries Co., 109 F.3d 1, 9 (1st Cir. 1997), cert. denied, 118 S.Ct. 685 (1998). Since the conspiracy alleged in the indictment was plainly meant to produce and did produce substantial adverse effects in the United States, the Sherman Act applies to it, unless section 7(a)(4) of the Shipping Act immunizes the conspiracy from the antitrust laws.

The principles of statutory construction applicable to antitrust immunities are also well-established. The fundamental rule is that exemptions from the antitrust laws are to be strictly construed. FMC v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973) (construing the 1916 Shipping Act). Moreover, as the Court observed, "[w]hen *** relationships are governed in the first instance by business judgment and not regulatory

coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws." Id. at 733, quoting Otter Tail Power Co. v. United States, 410 U.S. 366, 374 (1973). Accord, Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 218-19 (1966) (noting need to regulate cartels permitted by Shipping Act). This Court similarly recognized in Transpacific Westbound Rate Agreement v. FMC, 951 F.2d 950 (9th Cir. 1991) ("Transpacific"), that "[i]t does not seem logical that Congress intended to confer antitrust immunity on parties largely outside of the regulatory power of the Commission," id. at 954, and that "[i]t is implausible that Congress would provide a mechanism for shipping interests to obtain antitrust immunity, but otherwise be insulated from any form of agency regulation." Id. at 957.

The district court's decision, however, attributes to Congress precisely that implausible intent, since both the Philippine truckers and the conspiracy the court would immunize are plainly beyond the FMC's regulatory power. Nothing in the language of the Shipping Act suggests that Congress had such an intent. To the contrary, the text of the Act, which must be taken as a whole, Beecham v. United

States, 511 U.S. 368, 372 (1994),[14] compels the government's reading. In brief, section 4, entitled "Agreements Within Scope of Act," defines the scope of the Act and provides that "[t]his Act applies to agreements by or among ocean common carriers" and to agreements "among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers." Thereafter, section 7(a) provides an exemption from the antitrust laws for "agreements" of various types. Nothing in section 7 suggests that it applies to agreements other than those to which section 4 says the Act applies. Rather, the "familiar principle of expressio unius est exclusio alterius" bars any such extension of the exemption. See Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992). Accord, Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 167 (1993). The legislative history also supports the government's common sense reading of the text.

1. The Language and Structure of the Shipping Act.

The 1984 Act replaced the Shipping Act, 1916, 46 U.S.C. 801 et seq., with respect to the international ocean liner trades. The "heart" of the 1916 Act was section

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[14] Accord, John Hancock Mut. Insur. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 94 (1993) (court must construe "the language of the governing statute, guided not by a single sentence or member of a sentence, but looking to the provisions of the whole law, and to its object and policy") (internal quotations and brackets omitted).

15, 46 U.S.C. 814, which granted antitrust immunity to specified kinds of agreements by ocean common carriers and marine terminal operators upon approval by the FMC. See FMC v. Pacific Maritime Ass'n, 435 U.S. 40, 54 (1978), citing H.R. Rep. No. 87-1419, at 2, 15 (1962). The 1984 Act spread the substance of old section 15 over four separate provisions, sections 4-7. Section 4, like old section 15, says that the Act applies only to agreements of ocean common carriers and marine terminal operators. There is no indication that Congress intended sections 5-7 to expand the immunity beyond the types of agreements previously covered by section 15 and described by section 4 of the 1984 Act.

Sections 4-7 form an entirely sensible whole when read together. Section 4 defines the type of agreements to which the Act applies. Sections 5 and 6 require that most agreements within the scope of section 4 be filed with the FMC before they become effective, set out minimum standards for certain types of agreements, and establish the procedure the agency is to follow when they are filed. Sections 7(a)(1) and (2) then immunize from the antitrust laws all filed agreements that become effective under sections 5 and 6, and any activity undertaken "with a reasonable basis to conclude" that it is pursuant to such a filed agreement.

Section 5(a), however, also excludes from the filing requirement certain agreements within the scope of section 4; these agreements are therefore not entitled to immunity under section 7(a)(1)-(2). One such set of agreements, those "among common carriers to establish, operate, or maintain a marine terminal in the United States," was excluded because Congress decided not to grant them immunity. Section 7(b)(3), 46 U.S.C. app. 1706(b)(3), was added to make that point clear. H.R. Rep. No. 98-53, pt. 2, at 33 (1983) (Judiciary Committee); H.R. Conf. Rep. No. 98-600, at 38.

The other set of agreements that are excluded by section 5(a) from the filing requirement consists of "agreements related to transportation to be performed within or between foreign countries." The antitrust exemptions granted in sections 7(a)(3)-(5), in turn, apply to various types of agreements regarding transportation services within and between foreign countries.[15] While there is no explicit reference in exemptions (3)-(5) back to sections 4 and 5, the natural inference, from the correspondence of the types of agreements covered by them, is that Congress intended exemptions (3)-(5) to

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[15] To recapitulate, exemption (3) applies to agreements regarding transportation within and between foreign countries that have no direct effect on U.S. commerce, exemption (4) to agreements regarding the foreign inland segment of through transportation in a U.S. trade, and exemption (5) to agreements to provide marine terminal facilities outside the United States.

describe the extent of antitrust immunity to be given the types of agreements that are excluded from the filing requirements by section 5(a). Indeed, in light of section 4, which describes the scope of the 1984 Act, that is the only rational inference.

The district court's approach, on the other hand, would imply that in writing section 7 Congress either (i) forgot about the filing exemption in section 5(a) for agreements related to transportation "within or between" foreign countries, or (ii) intended to leave all of those unfiled ocean common carrier agreements subject to the antitrust laws. The court's reasoning thus assumes that Congress wrote exemptions (3)-(5) for an entirely different set of agreements relating to foreign transportation services–agreements that did not involve ocean common carriers and were not within the scope of the 1984 Act as described by section 4. The court seemed to recognize that its approach involved a significant leap of logic. It felt constrained to reach that conclusion, however, by its belief that, if exemptions (3) and (4) were limited by sections 4 and 5, they would be meaningless because there would be no ocean common carrier agreements to which they could apply.

The court was mistaken. The statutory language assumes that such agreements exist, and they do.

1. "[S]ection 5 incorporates the jurisdictional requirements of section 4," Transpacific, 951 F.2d at 954, and section 5(a) by its terms provides that agreements covered by section 4 shall be filed "except agreements related to transportation to be performed within and between foreign countries." The word "except" assumes that such agreements are covered by section 4. If no agreements regarding transportation within and between foreign countries were covered by section 4, then the "except" clause would be superfluous.

2. To rebut the government's reasoning that all of the exemptions granted in section 7(a) were limited by section 4, the district court began by holding that exemption (3) could not apply to ocean common carriers, based on this Court's decision in Transpacific that section 4 covers only agreements regarding vessel operations that utilize ports in the United States. See 951 F.2d at 953-54. The district court did not think that agreements relating to services via U.S. ports could also relate to "services within or between foreign countries" covered by exemption (3), so it assumed that exemption (3) must apply only to some other kind of service–although what other kind the district court never specifies (E.R. 85-86). The legislative history, however, makes it clear that that is not the case. The House Merchant Marine and Fisheries Committee explicitly described exemption (3) as intended to provide antitrust

immunity for "both landbridge and all-water services between foreign countries that transit or touch the United States." H.R. Rep. No. 98-53, pt. 1, at 33. "Landbridge" service is a through water-land-water service that provides an alternative to use of the Panama Canal between Europe and the Far East: it uses U.S. railroads to haul marine containers overland between ports on the East and West Coasts of the United States.[16] Similarly, the Senate Committee pointed out that a vessel might pick up cargo in Halifax, Nova Scotia, for delivery to Rotterdam and make an intermediate stop to pick up more cargo in Boston. S. Rep. No. 98-3, at 19 (1983).[17] In short, exemption (3) was intended to provide antitrust immunity for ocean common carrier services between foreign countries that use ports in the United States–hence the "via the United States" phrase. One does not have to imagine some other, unspecified kind of service to make exemption (3) meaningful.[18]

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[16] See Richard W. Palmer & Frank P. DeGiulio, Terminal Operations and Multimodal Carriage: History and Prognosis, 64 Tul. L. Rev. 281, 293 n.59 (1989).

[17] In recommending the "via the United States" clause at a committee hearing, a representative of Sea-Land Service, Inc., noted a variety of transportation arrangements whereby foreign-to-foreign movements use U.S. ports. 1981 Shipping Act: Hearing Before Subcommittee on Merchant Marine of the Senate Committee on Commerce, Science and Transportation, 97th Cong. 185 (1981) ("1981 Senate Hearings").

[18] It is difficult to imagine what other kind of transportation services between foreign (continued...)

3. The district court likewise thought that exemption (4) could not be limited to ocean common carriers. It reasoned that ocean common carriers must file their agreements related to through rates and that section 5(a) "in no way exempts ocean carriers from filing agreements relating to the foreign inland segment of through transportation" (E.R. 86). Thus, it concluded, exemption (4) could not refer to ocean carriers' agreements and must relate instead to someone else's.

The court's reasoning, however, overlooks the two separate levels of agreements involved in through rates. If a group of ocean common carriers agree among themselves on a through rate from the United States to an inland point overseas (e.g., Spokane to Canberra via the ports of Seattle and Sydney), the agreement relating to the overall through rate (Spokane to Canberra) must be filed, and would be covered by exemption (1), because it is not transportation that would be performed exclusively

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(...continued)
countries would receive a meaningful benefit from exemption (3). The district court's literal interpretation of the language of exemption (3) in isolation would apply to services with no conceivable nexus to the United States and even outside a maritime context (e.g., to an air or rail shipment from Paris to Berlin). Such an exemption would be both an anomalous appendage to an Act regulating ocean shipping, and wholly unnecessary because foreign transportation with no nexus to the United States is beyond the scope of the antitrust laws. See Pacific Seafarers, Inc. v. Pacific Far East Line, 404 F.2d 804, 816 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969).

within or between foreign countries and is thus not exempted from the filing requirement by section 5(a). On the other hand, to offer such through transportation, the ocean carriers must also make arrangements for the inland segments; and maintaining a uniform through rate requires at least some degree of agreement among the conference members regarding those arrangements.[19] Agreements regarding the foreign inland segment (Sydney to Canberra) would be excepted from the filing requirement by section 5(a), which provides that: "[a] true copy of every agreement entered into with respect to an activity described in section 4(a) or (b) of this Act shall be filed with the Commission, except agreements related to transportation to be performed within or between foreign countries ***." 46 U.S.C. app. 1704(a) (emphasis added). They would nevertheless be covered by exemption (4) as agreements among ocean common carriers concerning the foreign inland segment of through transportation.[20]

4. The district court also pointed to section 7(b)(1), which says that agreements "with or among" carriers providing U.S. inland transportation are not exempt from the

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[19] A "conference" is essentially an association of ocean common carriers that files a common tariff in a trade. See section 3(7), 46 U.S.C. app. 1702(7).

[20] Such agreements would not be covered by exemption (3) due to their direct effect on U.S. commerce.

antitrust laws. This, it thought, proved that the Act grants antitrust immunity to agreements not involving ocean common carriers; otherwise, the court reasoned, the denial of immunity for agreements "among" domestic carriers would be superfluous (E.R. 87-88). This, however, is a non sequitur. Neither the court nor the defendants has suggested any language in the Act, nor is there any, that could reasonably be read to grant antitrust immunity to agreements among U.S. inland carriers; there is certainly none anywhere in section 7(a), which speaks solely to filed agreements (which everyone agrees are limited by section 4) and to agreements regarding services in and between foreign countries. The "among" domestic carriers phrase simply makes explicit what would otherwise be implicit from the structure of the Act – that such agreements among U.S. inland carriers are not immune from the antitrust laws.[21]

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[21] This "belt and suspenders" approach is similarly evident in section 7(b)(3), which explicitly withholds immunity from carrier joint ventures to operate marine terminals in the United States. Section 7(a) does not immunize such agreements because section 5(a) exempts them from filing and they relate to services in the United States, not in foreign countries.

2. The Legislative History.

a. Overview

The lengthy legislative history of the 1984 Act contains no focused explanation of exemption (4). Nevertheless, if the statutory language leaves doubt, Congress's intent is discernible from the exemption's background and evidence regarding the overall relationship between sections 4 and 7. Thus, as the district court acknowledged (E.R. 89), the committee reports state that the language of section 4 (that the Act applies to agreements by or among ocean common carriers) was "intended *** to indicate the scope of the Act for purposes of defining the breadth of the antitrust exemption set forth in Section 7 of the bill." H.R. Rep. No. 97-611, pt. 2, at 31 (1982) (Judiciary Committee). Every committee that addressed the final language of section 4 said the same thing. See H.R. Rep. No. 98-53, pt. 1, at 29 (House Merchant Marine and Fisheries Committee); S. Rep. No. 98-3, at 21 (Commerce Committee). And the Conference Report, which this Court considers "the most reliable evidence of congressional intent,"[22] repeated the essence of those statements, saying (H.R. Conf. Rep. No. 98-600, at 28 (1984)):

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[22] Northwest Forest Resource Council v. Glickman, 82 F.3d 825, 835 (9th Cir. 1996).

> This section [4] states the coverage of the bill. It lists the type of agreements to which the bill applies. When read in connection with sections 5 and 7, the effect is to remove the listed agreements from the reach of the antitrust laws as defined in the bill.

This should have ended the legislative history inquiry with a judgment in the government's favor. The district court, however, in light of its mistaken reading of the statutory language, refused to credit those unqualified statements and thought they applied only to exemption (1) (E.R. 90, 94). At the same time, it misconstrued statements regarding an earlier version of the bill that immunity was being extended to "transportation services within or between foreign countries, terminal services in foreign countries, as well as the activities of foreign shippers' councils" in order to "harmonize U.S. shipping regulation more closely with our trading partners" (E.R. 90-94, quoting S. Rep. No. 97-414, at 34 (1982)). In relying on those earlier statements, the court both lost sight of the overall history of the complicated bill, which spanned four Congresses, and ignored the significant changes in the bill after those early statements.

The district court failed to appreciate the historical background of the law. Antitrust immunity had long been available for ocean common carriers and marine terminal operators under section 15 of the Shipping Act, 1916, former 46 U.S.C. 814,

but that immunity became effective only when the FMC, after a hearing, found that a filed agreement complied with certain broad statutory standards and approved it. See, e.g., Carnation Co. v. Pacific Westbound Conference, supra, 383 U.S. at 216-20. Multiple concerns developed regarding that statute, including the vagueness of the statutory standards given the FMC to apply, the long time required for approval, the consistency of U.S. regulation with that of foreign trading partners, and the possibility of antitrust liability for conduct the carriers reasonably believed was allowed by an approved agreement. See S. Rep. No. 98-3, at 6-7. An additional problem arose when the development of containerized shipping techniques led to intermodal (e.g., water/rail) shipping services. Although the FMC and the ICC approved the filing of through rates,[23] the Department of Justice challenged the FMC's authority to approve conference agreements relating to such rates in the United States. See United States v. FMC, 694 F.2d 793, 813-14 (D.C. Cir. 1982). That case was mooted by the expiration of the particular agreement, id. at 795, but all of these issues became grist for a legislative process that began as early as 1978, H.R. Rep. No. 98-53, pt. 1, at 4, and almost all were the subject of redrafting and compromise in the course of that

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[23] See Commonwealth of Pennsylvania v. ICC, 561 F.2d 278 (D.C. Cir. 1977) (affirming ICC authorization of joint intermodal rates)

process. None of the reports, however, refer to the absence of independent antitrust immunity for inland carriers as an issue.

In light of the pertinent committee reports and the historical background, the legislative history supports the government's view that all of the exemptions granted in section 7(a) apply only to agreements specified in section 4. We now examine that history in detail.

b. Detailed Review of Legislative History.

(i) 96th Congress. Antecedents of some provisions relevant here appeared in the proposed Ocean Shipping Act of 1980, organized in a way that created an explicit relationship between agreements exempted from filing and agreements exempted from the antitrust laws. Section 301 of that bill (S. 2585, 96th Cong.), as it passed the Senate, tracked the language of section 15 of the 1916 Act to the extent it required the filing of certain described agreements, but the drafters added in section 301(b) coverage of through route and through rate agreements between ocean carrier conferences and inland carriers. See 126 Cong. Rec. 9004 (Apr. 24, 1980). Section 302 then described three types of agreements that did not have to be filed and were exempt from the other regulatory provisions applicable to filed agreements, including the precursor of exemption (3)–"agreements which relate solely to transportation services between

foreign countries." Ibid. Section 315(a) then linked the filing exception (which applied only to agreements otherwise subject to section 301) to the antitrust immunity by exempting from the antitrust laws all agreements and activities described in section 302 as well as section 301. Id. at 9005.

(ii) 97th Congress - Senate. The next stage in the legislative history was the introduction of S. 1593, 97th Cong. on August 3, 1981 (see text at 127 Cong. Rec. 19364). In that bill most of the various elements now at issue acquired their current locations, but as in old S. 2585 antitrust immunity was tied expressly to regulatory coverage. The description of the covered activities and the filing requirements that had been combined in section 301 of the 96th Congress's S. 2585 were split between sections 4 and 5, with the provision for intermodal agreements between ocean common carriers and inland carriers retained as section 4(b). 127 Cong. Rec. at 19364-65. Antitrust immunity was addressed in section 8.[24] Section 8(a)(1) granted immunity to "[a]ny agreement or activity described in section 4." Although the filing exception was omitted, sections 8(a)(3)-(5) granted antitrust immunity to the three types of agreements

[24] One structural difference between S. 1593 and the Act as passed is the omission of section 7 of S. 1593 (dealing with so-called "loyalty contracts"), so that section 8 of S. 1593 became section 7 of the Act as passed.

(including the exemption (3) precursor) that had been excepted from filing under sections 302(a)(1)-(3) of the old S. 2585. Ibid. Section 8(b), in turn, made clear that the changes from old S. 2585 were not intended to expand antitrust immunity to non-ocean carriers; it specifically provided that: "This Act shall not be construed to extend antitrust immunity to air carriers, rail carriers, motor carriers, or common carriers by water not subject to this Act."

At a subsequent Senate Committee hearing on S. 1593, various carrier representatives expressed different concerns about these provisions. One, a representative of the Council of European and Japanese National Shipowners Association ("CENSA"), urged "technical drafting changes *** in section 8 in order to make clear that the entire antitrust exemption extends, as intended, to all activities regulated under the bill and all commercial activity abroad relating to shipping services in the U.S. liner trades," because "unilateral regulation and extraterritorial application of U.S. antitrust laws create most serious economic and jurisdictional problems." 1981 Senate Hearings, supra note 17, at 196-97 (statement of Dr. John-Henry de la Trobe). Dr. de la Trobe expressed particular concern that in specifying an immunity for agreements that relate "solely to transportation services between foreign countries" (emphasis added), section 8(a)(3) could be interpreted to deny immunity to

"arrangements by conferences or ocean carriers for inland foreign motor, rail or air transportation in connection with intermodal routes and services." Id. at 208 (emphasis added). At the same time, however, he explained that even in countries where conferences set intermodal rates, the members negotiated their divisions individually with the inland carriers, making either a profit or a loss as a matter of "the luck of the draw and the operation of a free market." Id. at 216. Thus, he concluded: "all we are seeking here is a right for conferences to set through rates which the members will charge shippers who want to use conference through-intermodal service." Id. at 197 (emphasis added).

It is the bill subsequently reported from the Committee in May 1982 on which the district court relied. The bill contained several revisions to sections 4-8 responsive to carrier comments. The Committee bill authorized the ocean carriers to agree among themselves on through intermodal rates in section 4(a), and dropped section 4(b) (relating to conference agreements with inland carriers on such rates). S. 1593, 97th Cong. (May 25, 1982). It also re-inserted in section 5(a) an exception to the filing requirement–this time the general one ultimately adopted for "agreements related to transportation to be performed within or between foreign countries." On the subject of antitrust immunity in section 8, the Committee bill expanded section 8(a)(1) to say

that the antitrust laws did not apply to "any agreement or activity described in section 4, whether or not filed and approved pursuant to sections 5 and 6," and added a new section (8)(a)(3) granting immunity for "any activity prohibited by this Act." With respect to foreign transportation (the original section 8(a)(3), which became section 8(a)(4)), it retained the word "solely," but expanded the provision to cover transportation services within as well as between foreign countries, and inserted the phrase "whether or not via the United States." It then added as section 8(a)(7) the narrowly drawn immunity now found in exemption (4). Section 8(b) of the bill was completely changed. Instead of denying antitrust immunity to any non-ocean carrier, section 8(b)(1) now withheld immunity from agreements "with or among" carriers in the United States not subject to the Act, and section 8(b)(2) withheld immunity from ocean carrier agreements on the divisions they would pay to inland carriers in the United States.

The accompanying Report describes the underlying policy of authorizing "ocean carriers to cooperate and coordinate services with antitrust immunity," S. Rep. No. 97-414, 97th Cong., at 25 (1982) (emphasis added), and to that end "the antitrust laws will have no place with respect to activities and agreements authorized or prohibited under

this bill" (id. at 26). Instead, the Shipping Act "exclusively" would regulate international shipping (ibid.). With respect to section 4, the Report states (id. at 28):

> It describes those types of agreements that are to be subject to Commission jurisdiction. These activities and agreements are exempted from the antitrust laws by section 8. It is not intended, however, to relieve any class of agreement from complying with section 12[25] or other provisions of the act.

The Report specifically describes section 4(a) as (i) authorizing ocean common carriers to fix rates, including through rates, among themselves, but (ii) withholding authority to negotiate collectively the divisions of rates with carriers in the United States, so that "the jurisdiction of the Interstate Commerce Commission over inland carriers is unaffected." Ibid.

The Report similarly describes section 8(a) as granting "a 'blanket' antitrust immunity" to activities regulated under the bill, so that "only the standards, remedies, and penalties of this legislation will apply." Id. at 34. It then says that (ibid.):

> In addition, transportation services within or between foreign countries, terminal services in foreign countries, as well as the activities of foreign shippers' councils are exempted from the antitrust laws. This is done in furtherance of the policy objective of the bill to harmonize U.S. shipping regulation more closely with that of our trading partners.

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[25] Section 12 of S. 1593, entitled "Prohibited Acts," became section 10 of the Act as passed.

Finally, it describes section 8(b) as intended to "make clear that the bill does not confer antiturst [sic] immunity for agreements between an ocean common carrier and groups of inland carriers, or among inland carriers alone, concerning intermodal movements," and also to "withhold antitrust immunity" for ocean common carrier agreements fixing inland divisions of through rates in the United States. Id. at 34-35 (emphasis added).

Taken as a whole, the Committee's action refutes the district court's inference that it intended the precursors of exemption (3) and (4) to immunize agreements among non-ocean carriers (E.R. 91-93). The district court appears to have been misled by the defendants' emphasis on one passage from CENSA's committee testimony (E.R. 90-92). CENSA is an organization of ocean carriers, and whatever consideration might be given to its sometimes ambiguous statement, its overriding concern was obviously with the ocean carriers' own arrangements for inland carriage as part of their inter-modal services.[26] Indeed, cartels among independent inland carriers would be contrary

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[26] Testimony before congressional committees may be helpful to determine the factual background that Congress was addressing, e.g., Dawson Chem. Co. v. Rohm & Haas Co., 448 U.S. 176, 204 (1980), but the broad language in which CENSA couched its proposed exemption and its invocation of international comity should not be confused with the intent of Congress. See Kelly v. Robinson, 479 U.S. 36, 51 n.13 (1986); S&E Contractors, Inc. v. United States, 406 U.S. 1, 13 n.9 (1972); Austasia Intermodal Lines v. FMC, 580 F.2d 642, 645 (D.C. Cir. 1978). The most authoritative (continued...)

to the ocean carriers' self-interest, and CENSA expressly acknowledged its members' reliance on the "free market" to secure inland carrier services (p. 38, supra).

Moreover, the Committee was aware that the antitrust exemption it proposed was subject to abuse, including even predatory conduct, and insisted that Shipping Act remedies would be substituted for the antitrust remedies displaced by its "blanket" immunity. The Committee explicitly stated its intent to ensure "that the prohibited acts and the sanctions for violation were sufficiently drawn to assure adequate protection against abuses" and not "to relieve any class of agreement from complying with section 12 [Prohibited Acts]." S. Rep. No. 97-414 at 28-29. It would not be consistent with that intent to construe broadly the Committee's brief remarks on the exemptions for transportation services within and between foreign countries "in addition" to the exemption for regulated activities (p. 40, supra). Indeed, aside from the reference to shippers' councils,[27] the Committee took care to phrase its description in terms of

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sources of legislative intent are the committee reports. Gustafson v. Alloyd Co., 513 U.S. 561, 580 (1995); Northwest Forest Resource Council v. Glickman, supra, 82 F.3d at 835. Of course, they must be read in the overall context of the bill and any subsequent changes in it.

[27] The separate antitrust immunity for shippers' councils was deleted in the House Judiciary Committee, H.R. Rep. No. 98-53, pt. 2, at 28 (noting danger to independent (continued...)

unregulated "services," not unregulated carriers. In connection with the Committee's complementary amendment to section 5(a) to exclude from the filing requirement "agreements related to transportation to be performed within or between foreign countries," the Committee was most likely referring merely to ocean carrier agreements that were excluded from the filing requirement, and thus from regulation under sections 5 and 6.

The district court likewise erred in finding that the "explicit denial in [section 8(b)(1) of] S. 1593 of immunity for domestic motor carrier agreements" implied an immunity for foreign inland carriers (E.R. 93). As the Committee explained, section 8(b)(1) was simply intended to "make clear" that the bill did not confer antitrust immunity for agreements between ocean carriers and inland carriers or among inland carriers alone. S. Rep. No. 97-414 at 34.[28] It cannot be used to infer that such an

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[27] (...continued)
carriers from shippers' councils with market power), and the Conference Committee. See H.R. Conf. Rep. No. 98-600, at 37-38 (dropped because unnecessary to conferring antitrust immunity on the ocean common carriers).

[28] In reading the Committee Report, it should be noted that there is a difference between the 1982 Committee's wording of section 4(a) in S. 1593 and section 4(a) as enacted. In providing that "[o]cean common carriers may agree to" fix rates, the former was intended to allow ocean common carriers to agree only "among themselves." S. Rep. No. 97-414, at 28. Section 4(a) as enacted, however, covers (continued...)

immunity would have been granted by some other provision of the bill. In short, nothing in the Senate Committee Report or bill supports the inference that the Committee intended to grant immunity to non-ocean carrier agreements. Instead, like the Senate bill in the 96th Congress, the amendments to sections 8(a) and (b) simply treat ocean carrier agreements regarding domestic and foreign inland carriage differently.[29]

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agreements "by and among" ocean common carriers, a phrasing that would include ocean common carrier agreements with other entities in the same manner as the 1916 Act. See FMC v. Pacific Maritime Ass'n, 435 U.S. 40, 50 & n. 14 (1978), and New York Shipping Ass'n v. FMC, 495 F.2d 1215, 1220 (2d Cir.), cert. denied, 419 U.S. 964 (1974) (both affirming 1916 Act coverage of multi-carrier agreements with labor unions). See also H.R. Conf. Rep. No. 98-600, at 38, reprinted at 1984 U.S.C.C.A.N. 167, 294. The difference could be read as moving the boundary of the antitrust immunity from agreements with only ocean carrier participants to those between ocean carriers and non-ocean carriers, but it does not affect the fundamental point that neither version would grant immunity for agreements "among" inland carriers in which ocean common carriers do not participate.

[29] Section 308(3) of S. 2585, 96th Cong., had required that ocean carrier intermodal agreements give participating inland carriers in the United States, but not those in foreign countries, a right of "independent action" (i.e., a right to deviate unilaterally from any conference rates). 126 Cong. Rec. at 9004-05. Section 5(c)(4)(B) of S. 1593 as introduced would have extended a right of independent action to all participating inland carriers, but that provision was dropped along with section 4(b) (authorizing conferences agreements with inland carriers), and the subject matter (the relationship between ocean carrier conferences and their intermodal partners) was moved to exemption (4) and sections 7(b)(1)-(2) in the Committee revision of S. 1593.

(iii) 97th Congress - House. The district court not only read too much into S. Rep. No. 97-414, but it also ignored the subsequent history of the bill. Only two months after the Senate Committee issued its Report, the House Judiciary Committee proposed two fundamental changes that were ultimately adopted. The first was to excise the "blanket" immunity proposed by the Senate Committee in favor of an immunity only for conduct that is at least colorably authorized by filed agreements. Compare id. 34, with H.R. Rep. No. 97-611, pt. 2, at 32-33 (1982).[30] The second was to change the focus of section 4 from authorizing activities to defining the agreements within the scope of the Act. Id. at 3. As the Judiciary Committee explained (id. at 31) (emphasis added):

> The Committee amendment changed the title of this section from "authorized activities" to "Agreements Within Scope of Act." A similar

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[30] While there is some difference between the Judiciary Committee's proposal and that ultimately adopted, the basic compromise is the same. The proponents of "blanket immunity" were concerned that carriers could be held liable under the antitrust laws for conduct that they honestly believed was covered by a filed agreement, and therefore proposed that only Shipping Act remedies would apply for any conduct within the scope of the Act. Exemption (2) deals with the problem by granting antitrust immunity wherever there is a reasonable basis for a belief that conduct is covered by a filed agreement. See H.R. Rep. No. 97-611, pt. 2, at 32-33 (1982); H.R. Conf. Rep. 98-600, at 37 (1984). Section 7(c) further limits antitrust relief to actions filed by the government, and ensures that liability is purely prospective where a filed agreement is invalidated or set aside. 46 U.S.C. app. 1706(c).

> change was made in the introductory clause of subsection (a). Through these changes, the Committee makes clear that this section is not intended to define what conduct is or is not authorized under the Act, but rather to indicate the scope of the Act for purposes of defining the breadth of the antitrust exemption set forth in Section 7 of the bill.

As noted at the beginning of this discussion, that change, and its explanation, were adopted in all subsequent committee reports in both the House and the Senate, as well as in the Conference Report. See page 32, supra.

(iv) 98th Congress. Finally, in the 98th Congress (which passed the Act) the Senate Committee Report described its primary motivation as meeting "internationally accepted" standards and stated that the Act "thus reaffirms and clarifies the authority of ocean carriers to cooperate and coordinate services with antritrust [sic] immunity." S. Rep. No. 98-3, at 18 (emphasis added).

In that context, the treatment of exemptions (3) and (4) is significant as much for what was not said as for what was said. The bill passed by the Senate included both provisions. The House Merchant Marine and Fisheries Committee deleted the word "solely" from exemption (3), so that it read: "[t]he antitrust laws will not apply to–*** any agreement or activity that relates to transportation services within or between foreign countries, whether or not via the United States" (section 7(a)(4) of H.R. 1878, 98th Cong. (April 12, 1983)), a provision which it explained as directed to landbridge

and similar services. H.R. Rep. No. 98-53, pt. 1, at 33. It also omitted exemption (4) from the bill entirely. It did not explain that omission, but on its face the newly broadened exemption (3) was coextensive with the filing exception for transportation within and between foreign countries under section 4(a) of the Committee's bill, thus making exemption (4) superfluous. The House Judiciary Committee, however, then qualified the immunity in exemption (3) to apply only if the agreement has no "direct, substantial, and reasonably foreseeable effect on the commerce of the United States." See H.R. Rep. No. 98-53, pt. 2, at 32-33. As the Committee explained in inserting that language, it wanted to reach agreements on foreign-to-foreign transportation where the antitrust laws would provide the only remedy because they were not regulated under the Shipping Act,[31] and (id. at 33):

> Concerns with any undue extension of our antitrust jurisdiction were addressed by the Congress last year in Title IV of the Export Trading Company Act[32] and in recent court decisions emphasizing considerations of international comity in the court's determination whether to exercise jurisdiction. E.g., Timberlane Lumber Co. v.

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[31] The Judiciary Committee gave as an example Pacific Seafarers, Inc. v. Pacific Far East Line, supra, 404 F.2d 804, where a group of U.S.-flag carriers had conspired to exclude another U.S.-flag carrier, which would not adhere to their cartel rates, from the carriage of U.S. government financed cement between Taiwan and South Vietnam.

[32] Codified at 15 U.S.C. 6a.

Bank of America, N.T. & S.A., 549 F.2d 597th [sic] (9th Cir. 1976).

The Act reached its final shape with respect to these provisions only after a compromise bill submitted on the House floor dropped exemption (3) entirely and reintroduced exemption (4)–again without comment–129 Cong. Rec. 27995 (Oct. 17, 1983), but exemption (3), as previously modified by the Judiciary Committee, was added back by the House-Senate Conference Committee. The Conference Report echoed the Judiciary Committee's explanation of exemption (3) in noting that it "parallels language in Title IV of the Export Trading Company Act of 1982, intended to limit the extraterritorial reach of United States antitrust laws." H.R. Conf. Rep. No. 98-600, at 37 (1984). It made no reference, however, to exemption (4), which had been in the bill passed by both chambers despite its temporary absence in the House.

In light of this history, it is not reasonable to infer that Congress intended immunity under exemptions (3) and (4) to cover free-standing price fixing conspiracies among entities not regulated by the Act. The almost casual way in which exemptions (3) and (4) were revised, dropped, and reinserted is entirely inconsistent with the role the district court would assign to them, since it seems highly unlikely that Congress would use an Act regulating ocean carriers as a vehicle for granting such unprecedented

exemptions with no explanation whatever of its action. In that respect the silence of the legislative history with respect to exemption (4) speaks volumes. Cf. Gustafson v. Alloyd Co., supra, 513 at 582 (drawing negative inference from a "conspicuous absence in the legislative history"). Moreover, the only possible rationale for such action would be concerns of international comity, but as Congress's adoption of the Judiciary Committee's amendment to exemption (3) demonstrates, that was not a controlling factor where a foreign agreement could directly affect the commerce of the United States. In short, a fair reading of the legislative history confirms that section 4 means what it says–that the Act applies to agreements among ocean common carriers –and that exemption (4) extends only to agreements of ocean common carriers relating to the inland segments of their through intermodal routes.

3. The Policy of the Act

The district court also ignored the underlying policy of the Act in construing it to extend antitrust immunity to entities not regulated by the Act. The committee reports make clear that immunity was intended for "agreements and activities subject to regulation by the Federal Maritime Commission." H.R. Rep. No. 98-53, pt. 1, at 3. Accord, S. Rep. No. 98-3, at 29 (extends immunity "to agreements of ocean common carriers *** and to other activities regulated under provisions of the bill"). The

statutory declaration of policy is similarly clear that the Act is directed to ocean carriage and ocean carriers. 46 U.S.C. app. 1701. Inland carriage is addressed throughout the Act, including exemption (4), only as an adjunct to ocean carriage in the provision of intermodal transportation under through rates. Applying the exemption to immunize a conspiracy by unregulated entities, to which regulated ocean carriers are not parties, is directly contrary to the policy of the Act.

The legislators who drafted the 1984 Act, like those who drafted the 1916 Act,[33] were aware of the potential for abuse arising from anticompetitive agreements. See, e.g., H.R. Rep. No. 98-53, pt. 1, at 21 (concern about "highly anticompetitive

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[33] Prior to drafting the 1916 Act, a congressional committee examined the shipping industry at length, and concluded that:

> While admitting their many advantages, the Committee is not disposed to recognize steamship agreements and conferences, unless the same are brought under some form of effective government supervision. To permit such agreements without supervision would mean giving the parties thereto unrestricted right of action. Abuses exist, and the numerous complaints received by the Committee show that they must be recognized.

Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade, H.R. Doc. 805, 63d Cong., 2d Sess. 417-18 (1914) ("Alexander Report"), quoted in Carnation Co. v. Pacific Westbound Conf., 383 U.S. 213, 218-19 (1966).

combinations whose detrimental aspects would outweigh any efficiencies they would generate"); S. Rep. No. 98-3, at 22 (focus on "adequate protection against abuses of concerted shipping activity"); H.R. Rep. No. 98-53, pt. 2, at 32-33 (amending exemption (3) to ensure that the antitrust laws would apply where Shipping Act remedies are unavailable). They tried to be careful, therefore, to achieve a fair balance between the interests of carriers, shippers, and others involved in the ocean shipping industry. See S. Rep. No. 98-3, at 11-12 (Committee "sought to reconcile the naturally conflicting interests of shippers and carriers"); H.R. Rep. No. 98-53, pt. 1, at 24 ("this bill is a marvel of accommodation," including "the Department of Justice's desire to be assured that the market power of conferences does not act in disregard of the interests of shippers, manufacturers and the general public"). Among the compromises adopted were requirements that ocean carrier ratemaking organizations maintain open membership and allow members to take independent action on rates (section 5(b), 46 U.S.C. app. 1704(b)), FMC authority to file suit against "substantially anticompetitive agreements" (section 6(g), 46 U.S.C. app. 1705(g)), and prohibitions on unfair and predatory conduct by ocean carriers (section 10, 46 U.S.C. app. 1709). Against that background this Court observed in Transpacific that "[i]t does not seem logical that Congress intended to confer antitrust immunity on parties largely outside of the

regulatory power of the Commission," 951 F.2d at 954–an observation as applicable to the foreign motor carriers here as to the ocean carriers serving Canadian ports that were involved in Transpacific.

There are a number of reasons for applying in this case the policy limiting the antitrust exemptions to persons regulated under the Act. First, the overall emphasis in the legislative policy on the substitution of regulatory remedies for antitrust liability, and the likelihood of abuse where there is neither regulatory nor antitrust remedy, strongly argues for a narrow construction of any immunity where there is no regulatory oversight. Second, the Act regulates the ocean carriers' overall through rate agreements, which are the ones that have an immediate impact on shippers. Those agreements are subject to the full panoply of Shipping Act protections for shippers, including the ocean carriers' right of independent action, the FMC's power to act against excessively anticompetitive arrangements, and the prohibitions on discrimination and predatory conduct under section 10. Subsidiary arrangements the ocean carriers make as a group with respect to foreign inland transportation will ordinarily not have significant commercial effects on U.S. shippers and consumers, because the costs the shippers pay will have to be covered by the ocean carriers' through rates. Third, Congress expected the antitrust immunity for ocean carriers to

result in various efficiencies that would ultimately benefit shippers, and to help maintain the position of U.S.-flag carriers vis-a-vis their foreign competitors. See H.R. Rep. No. 98-53, pt. 1, at 14; S. Rep. No. 98-3, at 7-9. By contrast, wholly unregulated agreements among foreign inland carriers are subject to no such ameliorating conditions and have as their sole objective increasing the prices those carriers can charge. As in this case, the effect will be higher costs for the ocean carriers, which will often be passed on in the form of higher through rates for U.S. shippers and consignees, with no offsetting economic benefits. That is hardly the balance of shipper and carrier interests that Congress articulated, and not one that should be attributed to it.[34]

C. Even If the District Court's Reading of the Shipping Act Is Correct, its Decision Should Be Reversed Because the Indictment Is Not Limited to Shipments Within Exemption (4).

The indictment describes the alleged conspiracy and the actions taken to implement it in paragraphs 2-4 (E.R. 2-4). According to paragraphs 2 and 3, the defendants conspired to fix prices "for moving services supplied in connection with the

[34] The Shipping Act incorporates a concern about international comity with respect to "ocean commerce," 46 U.S.C. app. 1701(2), and it is reflected in the filing exception in section 5(a) as well as in exemptions (3)-(5). As shown by the legislative history of exemption (3), however, it played a subordinate role, and by itself does not support the inference of a statutory exemption here, where there are no other potential benefits or regulatory controls. See H.R. Rep. No. 98-53, pt. 2, at 32-33.

transportation of military shipments of household goods between the Philippines and the United States," and "the substantial term of [the charged conspiracy] was to increase to U.S. freight forwarders and the United States Department of Defense the prices paid for moving services." Paragraph 4 describes the defendants' actions to implement it, and nothing in it limits the generality of the alleged conspiracy. Nevertheless, the district court, relying on the definition of "military shipments of household goods" in paragraph 7 and the foreign commerce jurisdictional allegations in paragraphs 13-19, concluded that the charged offense was limited to "through transportation" shipments under the Shipping Act. In doing so it erred.

The basic rules for construing indictments in this Circuit are well-settled:

> "To be sufficient, an indictment must state the elements of the offense charged with sufficient clarity to apprise a defendant of the charge against him, primarily so that he can defend himself against the charge and plead double jeopardy in appropriate cases." *** "The indictment must be 'read as a whole' and construed according to common sense."

Echavarria-Olarte v. Reno, 35 F.3d 395, 397 (9th Cir. 1994), cert. denied, 514 U.S. 1090 (1995) (citations omitted). The bar is even higher for Tucor. As this Court held in United States v. Ruelas, supra, 106 F.3d at 1419:

> Although Ruelas may raise a defective indictment claim at any time, we liberally construe the indictment in this case because he did not object to it before he pleaded guilty. See [United States v. James, 980 F.2d 1314,

> 1318 (9th Cir. 1992), cert. denied, 510 U.S. 838 (1993)]; United States v. Coleman, 656 F.2d 509, 510-11 (9th Cir. 1981). "When the sufficiency of the indictment is challenged after trial, it is only required that the necessary facts appear in any form or by fair construction can be found within the terms of the indictment." James, 980 F.2d at 1317 (internal quotations omitted) (emphasis in original).

A common sense reading of the indictment in this case shows that it clearly passes those tests. It sets out all the elements of an across-the-board conspiracy to raise prices on DoD shipments of household goods between the United States and the Philippines, giving the defendants ample notice of the charges for purposes of preparing their defenses and pleading double jeopardy. The "Trade and Commerce" allegations on which the district court relied were designed simply to explain how and why the foreign conspiracy had an impact on the commerce of the United States for Sherman Act jurisdictional purposes, including the need for the U.S. freight forwarders to employ the defendants and to pass the price increases back to DoD. The allegations were drafted without reference to the Shipping Act, and do not discuss the forwarders' relationships with ocean common carriers. Indeed, the only reference to transportation by water–and that an indirect one–is the statement in paragraph 13 that defendants transported shipments between military installations and "a port" in the Philippines (E.R. 6).

Rather than liberally construing it as a whole, the district court went beyond the face of the indictment to infer that all the shipments covered by it were made under Shipping Act "through transportation" arrangements (E.R. 97-98). There is, however, no summary judgment procedure in criminal cases, and Luzon's motion to dismiss the indictment must be decided on the face of the indictment. See United States v. Jenson, 93 F.3d 667, 669 (9th Cir. 1996); United States v. Critzer, 951 F.2d 306, 307 (11th Cir. 1992) (cannot consider even evidence tendered by the government). If there are any factual issues, the defendant can plead not guilty and demand a trial to resolve them. United States v. Broce, 488 U.S. 563, 571 (1989). Conversely, in pleading guilty Tucor admitted not only the facts alleged in the indictment, but that it committed the crime charged, id. at 570, and waived all claims except those from which "the judge could determine at the time of accepting the plea, from the face of the indictment or from the record, that the government lacked the power to bring the indictment." United States v. Montilla, 870 F.2d 549, 552 (1989), amended on other grounds, 907 F.2d 115 (9th Cir. 1990). See Broce, supra at 575-76.

The court's error in that respect was prejudicial, not merely technical. The allegation that it considered dispositive regarding the nature of the transportation arrangements was the definition of "military shipments of household goods" as

shipments "transported between the Philippines and the United States under a Government Bill of Lading" (E.R. 4 ¶7). But nothing in the indictment describes the nature of those Bills of Lading. The court referred to a DoD official's declaration introduced in an earlier proceeding to find as a matter of fact that the indictment covered shipments made under International Through Government Bills of Lading ("ITGBLs"), and that the freight forwarders incorporated the costs of the foreign agency services in their bids to DoD (E.R. 61-63). From those facts it then inferred that the shipments constituted "through transportation" within the meaning of the Shipping Act (E.R. 97-98). The inference, however, was mistaken. Even assuming the indictment referred to ITGBLs, that is not enough to establish "through transportation;" whether multiple carriers provide through transportation and charge a through rate under an ITGBL is a factual issue subject to proof in each case. Cf. United States v. Mississippi Valley Barge Line, 285 F.2d 381, 390-93 (8th Cir. 1960) (Blackmun, J.). See also Atlantic Coast Line R.R. v. Riverside Mills, 219 U.S. 186, 197-97 (1911). Similarly, the fact that the freight forwarders include the foreign inland carriers' charges in their bids to DoD (E.R. 98) does not establish Shipping Act coverage; that would

arise only for shipments on which the forwarders take responsibility and pay for the ocean carriage.[35]

In any event, if the district court had looked at all the extrinsic evidence in this case, it would have referred to a second declaration by the same DoD official showing that DoD uses air as well as water transportation for ITGBL shipments (E.R. 59). Shipments carried by air are not covered by the Shipping Act exemption. More importantly, in the context argued here, the declaration also explains that for water transportation of ITGBL shipments DoD frequently used "Code 5" services, in which (i) the U.S. freight forwarder takes responsibility for the domestic and foreign inland

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[35] The identity of the initial carrier is obviously not dispositive, since a single firm can perform multiple functions. For example, a representative of North American Van Lines testified that (1981 Senate Hearings 440):

> North American operates domestically as a motor common and contract carrier, an air freight forwarder, an exempt surface forwarder of used household goods, and as a motor carriage broker (through a subsidiary); internationally, North American conducts operations as an air freight forwarder and as a non-vessel operating ocean carrier of used household goods. North American, through its motor carrier subsidiary, intends to file with the [FMC] an application for an ocean freight forwarder license.

Thus, the arrangements for the individual shipments determine what role a particular entity plays.

movements, but (ii) DoD contracts separately for the ocean carriage (ibid.). The existence of such shipments is more than "hypothetical," as the district court characterized them (E.R. 98). Those shipments do not meet the requirements for "through transportation" as defined in the Shipping Act, 46 U.S.C. 1702(25)-(26), and a freight forwarder would not be acting as a "common carrier" under the Act with respect to them. See 46 U.S.C. app. 1702(6).

The other allegation on which the court relied also fails to support its conclusion. The references in paragraphs 15-18 of the indictment regarding a "continuous and uninterrupted flow of United States foreign commerce" do not refer to the shipping arrangements in which the defendants participated, but to the movement of billing documents, payments, supplies, and personnel affected by the conspiracy.[36] The district court also cites paragraph 19 as referring to a continuous flow of commerce (E.R. 97). In fact, paragraph 19 alleges simply that: "The business activities of the

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[36] In any event, a "continuous flow of commerce" for Sherman Act and constitutional jurisdictional purposes cannot be equated with "through transportation" under the Shipping Act (E.R. 97, citing E.R. 7-8 ¶¶15-19). A "mere practical continuity in the transportation" is not enough to establish a through route under the Interstate Commerce Act, United States v. Munson S.S. Line, 283 U.S. 43, 47 (1931); United States v. Mississippi Valley Barge Line, supra, 285 F.2d at 392, and, given the "through rate" requirement, it plainly does not suffice to establish "through transportation" under the Shipping Act either.

defendants and co-conspirators that are the subject of this indictment were within the flow of, and substantially affected, United States foreign trade and commerce" (E.R. 8). "[M]oving services supplied in connection with the transportation of military shipments of household goods between the Philippines and the United States," the line of business alleged to be the subject of the conspiracy in paragraph 2 of the indictment, would obviously affect the United States foreign commerce regardless of whether the defendants' activities were part of "through transportation" services within the meaning of the Shipping Act.

CONCLUSION

The decision of the district court should be reversed.

Respectfully submitted.

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OCTOBER 1998

CERTIFICATION PURSUANT TO CIRCUIT RULE 32(e)(4)

Pursuant to Ninth Circuit Rule 32(e)(4), I hereby certify that the attached brief uses proportionately spaced type, has a typeface of 14 points or more, and contains 13,977 words.

Robert J. Wiggers

Date: October 28, 1998

CERTIFICATE OF SERVICE

I, Robert J. Wiggers, hereby certify that on this 28th day of October, 1998, I caused to be served two copies of the foregoing Brief for the United States and one copy of Excerpts of Record for the United States by first-class mail, postage prepaid, on each of the following:

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STATUTORY APPENDIX

UNITED STATES CODE ANNOTATED
TITLE 46 APPENDIX. SHIPPING
CHAPTER 36--INTERNATIONAL OCEAN COMMERCE TRANSPORTATION

Current through P.L. 105-216, approved 7-29-98

§ 1701. Declaration of policy

The purposes of this chapter are--

(1) to establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs;

(2) to provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices; and

(3) to encourage the development of an economically sound and efficient United States-flag liner fleet capable of meeting national security needs.

(Pub.L. 98-237, § 2, Mar. 20, 1984, 98 Stat. 67.)

§ 1702. Definitions

As used in this chapter--

(1) "agreement" means an understanding, arrangement, or association (written or oral) and any modification or cancellation thereof; but the term does not include a maritime labor agreement.

(2) "antitrust laws" means the Act of July 2, 1890 (ch. 647, 26 Stat. 209), as amended [15 U.S.C.A. § 1 et seq.]; the Act of October 15, 1914 (ch. 323, 38 Stat. 730), as amended [15 U.S.C.A. §§ 12, 13, 14-19, 20, 21, 22-27]; the Federal Trade Commission Act (38 Stat. 717), as amended [15 U.S.C.A. § 41 et seq.]; sections 73 and 74 of the Act of August 27, 1894 (28 Stat. 570), as amended [15 U.S.C.A. §§ 8, 9]; the Act of June 19, 1936 (ch. 592, 49 Stat. 1526), as amended [15 U.S.C.A. §§ 13, 13a, 13b, and 21a]; the Antitrust Civil Process Act (76 Stat. 548), as amended [15 U.S.C.A. § 1311 et seq.]; and amendments and Acts supplementary thereto.

(3) "assessment agreement" means an agreement, whether part of a collective-bargaining agreement or negotiated separately, to the extent that it provides for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized.

(4) "bulk cargo" means cargo that is loaded and carried in bulk without mark or count.

(5) "Commission" means the Federal Maritime Commission.

(6) "common carrier" means a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that--

(A) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and

(B) utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker. As used in this paragraph, [FN1] "chemical parcel-tanker" means a vessel whose cargo-carrying capability consists of individual cargo tanks for bulk chemicals that are a permanent part of the vessel, that have segregation capability with piping systems to permit simultaneous carriage of several bulk chemical cargoes with minimum risk of cross-contamination, and that has a valid certificate of fitness under the International Maritime Organization Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk.

(7) "conference" means an association of ocean common carriers permitted, pursuant to an approved or effective agreement, to engage in concerted activity and to utilize a common tariff; but the term does not include a joint service, consortium, pooling, sailing, or transshipment arrangement.

(8) "controlled carrier" means an ocean common carrier that is, or whose operating assets are, directly or indirectly, owned or controlled by the government under whose registry the vessels of the carrier operate; ownership or control by a government shall be deemed to exist with respect to any carrier if--

(A) a majority portion of the interest in the carrier is owned or controlled in any manner by that government, by any agency thereof, or by any public or private person controlled by that government; or

(B) that government has the right to appoint or disapprove the appointment of a majority of the directors, the chief operating officer, or the chief executive officer of the carrier.

(9) "deferred rebate" means a return by a common carrier of any portion of the freight money to a shipper as a consideration for that shipper giving all, or any portion, of its shipments to that or any other common carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

(10) "fighting ship" means a vessel used in a particular trade by an ocean common carrier or group of such carriers for the purpose of excluding, preventing, or reducing competition by driving another ocean common carrier out of that trade.

(11) "forest products" means forest products in an unfinished or semifinished state that require special handling moving in lot sizes too large for a container, including, but not limited to lumber in bundles, rough timber, ties, poles, piling, laminated beams, bundled siding, bundled plywood, bundled core stock or veneers, bundled particle or fiber boards, bundled hardwood, wood pulp in rolls, wood pulp in unitized bales, paper board in rolls, and paper in rolls.

(12) "inland division" means the amount paid by a common carrier to an inland carrier for the inland portion of through transportation offered to the public by the common carrier.

(13) "inland portion" means the charge to the public by a common carrier for the nonocean portion of through transportation.

(14) "loyalty contract" means a contract with an ocean common carrier or conference, other than a service contract or contract based upon time-volume rates, by which a shipper obtains lower rates by committing all or a fixed portion of its cargo to that carrier or conference.

(15) "marine terminal operator" means a person engaged in the United States in the business of furnishing wharfage, dock,

warehouse, or other terminal facilities in connection with a common carrier.

(16) "maritime labor agreement" means a collective-bargaining agreement between an employer subject to this Act, or group of such employers, and a labor organization representing employees in the maritime or stevedoring industry, or an agreement preparatory to such a collective-bargaining agreement among members of a multiemployer bargaining group, or an agreement specifically implementing provisions of such a collective-bargaining agreement or providing for the formation, financing, or administration of a multiemployer bargaining group; but the term does not include an assessment agreement.

(17) "non-vessel-operating common carrier" means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

(18) "ocean common carrier" means a vessel-operating common carrier.

(19) "ocean freight forwarder" means a person in the United States that--

(A) dispatches shipments from the United States via common carriers and books or otherwise arranges space for those shipments on behalf of shippers; and

(B) processes the documentation or performs related activities incident to those shipments.

(20) "person" includes individuals, corporations, partnerships, and associations existing under or authorized by the laws of the United States or of a foreign country.

(21) "service contract" means a contract between a shipper and an ocean common carrier or conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level--such as, assured space, transit time, port rotation, or similar service features; the contract may also specify provisions in the event of nonperformance on the part of either party.

(22) "shipment" means all of the cargo carried under the terms of a single bill of lading.

(23) "shipper" means an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made.

(24) "shippers' association" means a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group in order to secure carload, truckload, or other volume rates or service contracts.

(25) "through rate" means the single amount charged by a common carrier in connection with through transportation.

(26) "through transportation" means continuous transportation between origin and destination for which a through rate is assessed and which is offered or performed by one or more carriers, at least one of which is a common carrier, between a United States point or port and a foreign point or port.

(27) "United States" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Marianas, and all other United States territories and possessions.

(Pub.L. 98-237, § 3, Mar. 20, 1984, 98 Stat. 67, amended Pub.L. 99-307, § 11, May 19, 1986, 100 Stat. 447.)

[FN1] So in original. Probably should be "subparagraph".

§ 1703. Agreements within scope of chapter

(a) Ocean common carriers

This chapter applies to agreements by or among ocean common carriers to--

(1) discuss, fix, or regulate transportation rates, including through rates, cargo space accommodations, and other conditions of service;

(2) pool or apportion traffic, revenues, earnings, or losses;

(3) allot ports or restrict or otherwise regulate the number and character of sailings between ports;

(4) limit or regulate the volume or character of cargo or passenger traffic to be carried;

(5) engage in exclusive, preferential, or cooperative working arrangements among themselves or with one or more marine terminal operators or non-vessel-operating common carriers;

(6) control, regulate, or prevent competition in international ocean transportation; and

(7) regulate or prohibit their use of service contracts.

(b) Marine terminal operators

This chapter applies to agreements (to the extent the agreements involve ocean transportation in the foreign commerce of the United States) among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers to--

(1) discuss, fix, or regulate rates or other conditions of service; and

(2) engage in exclusive, preferential, or cooperative working arrangements.

(c) Acquisitions

This chapter does not apply to an acquisition by any person, directly or indirectly, of any voting security or assets of any other person.

(Pub.L. 98-237, § 4, Mar. 20, 1984, 98 Stat. 70.)

§ 1704. Agreements

(a) Filing requirements

A true copy of every agreement entered into with respect to an activity described in section 1703(a) or (b) of this title shall be filed with the Commission, except agreements related to transportation to be performed within or between foreign countries and agreements among common carriers to establish, operate, or maintain a marine terminal in the United States. In the case of an oral agreement, a complete memorandum specifying in detail the substance of the agreement shall be filed. The Commission may by regulation prescribe the form and manner in which an agreement shall be filed and the additional information and documents necessary to evaluate the agreement.

(b) Conference agreements

Each conference agreement must--

(1) state its purpose;

(2) provide reasonable and equal terms and conditions for admission and readmission to conference membership for any ocean common carrier willing to serve the particular trade or route;

(3) permit any member to withdraw from conference membership upon reasonable notice without penalty;

(4) at the request of any member, require an independent neutral body to police fully the obligations of the conference and its members;

(5) prohibit the conference from engaging in conduct prohibited by section 1709(c)(1) or (3) of this title;

(6) provide for a consultation process designed to promote--

(A) commercial resolution of disputes, and

(B) cooperation with shippers in preventing and eliminating malpractices;

(7) establish procedures for promptly and fairly considering shippers' requests and complaints; and

(8) provide that any member of the conference may take independent action on any rate or service item required to be filed in a tariff under section 1707(a) of this title upon not more than 10 calendar days' notice to the conference and that the conference will include the new rate or service item in its tariff for use by that member, effective no later than 10 calendar days after receipt of the notice, and by any other member that notifies the conference that it elects to adopt the independent rate or service item on or after its effective date, in lieu of the existing conference tariff provision for that rate or service item.

(c) Interconference agreements

Each agreement between carriers not members of the same conference must provide the right of independent action for each carrier. Each agreement between conferences must provide the right of independent action for each conference.

(d) Assessment agreements

Assessment agreements shall be filed with the Commission and become effective on filing. The Commission shall thereafter, upon complaint filed within 2 years of the date of the agreement, disapprove, cancel, or modify any such agreement, or charge or assessment pursuant thereto, that it finds, after notice and hearing, to be unjustly discriminatory or unfair as between carriers, shippers, or ports. The Commission shall issue its final decision in any such proceeding within 1 year of the date of filing of the complaint. To the extent that an assessment or charge is found in the proceeding to be unjustly discriminatory or unfair as between carriers, shippers, or ports, the Commission shall remedy the unjust discrimination or unfairness for the period of time between the filing of the complaint and the final decision by means of assessment adjustments. These adjustments shall be implemented by prospective credits or debits to future assessments or charges, except in the case of a complainant who has ceased activities subject to the assessment or charge, in which case reparation may be awarded. Except for this subsection and section 1706(a) of this title, this chapter, the Shipping Act, 1916 [46 U.S.C.A. § 801 et seq.], and the Intercoastal Shipping Act, 1983 [46 U.S.C.A. § 843 et seq.], do not apply to assessment agreements.

(e) Maritime labor agreements

This chapter and the Shipping Act, 1916 [46 App. U.S.C.A. § 801 et seq.], do not apply to maritime labor agreements. This subsection does not exempt from this chapter or the Shipping Act, 1916 [46 App. U.S.C.A. § 801 et seq.], any rates, charges, regulations, or practices of a common carrier that are required to be set forth in a tariff, whether or not those rates, charges, regulations, or practices arise out of, or are otherwise related to, a maritime labor agreement.

(Pub.L. 98-237, § 5, Mar. 20, 1984, 98 Stat. 70; Pub.L. 98-595, § 3(b)(1), Oct. 30, 1984, 98 Stat. 3132; Pub.L. 104-88, Title III, § 335(c)(2), Dec. 29, 1995, 109 Stat. 954.)

§ 1705. Action on agreements

(a) Notice

Within 7 days after an agreement is filed, the Commission shall transmit a notice of its filing to the Federal Register for publication.

(b) Review standard

The Commission shall reject any agreement filed under section 1704(a) of this title that, after preliminary review, it finds does not meet the requirements of section 1704 of this title. The Commission shall notify in writing the person filing the agreement of the reason for rejection of the agreement.

(c) Review and effective date

Unless rejected by the Commission under subsection (b) of this section, agreements, other than assessment agreements, shall become

effective--

(1) on the 45th day after filing, or on the 30th day after notice of the filing is published in the Federal Register, whichever day is later; or

(2) if additional information or documentary material is requested under subsection (d) of this section, on the 45th day after the Commission receives--

(A) all the additional information and documentary material requested; or

(B) if the request is not fully complied with, the information and documentary material submitted and a statement of the reasons for noncompliance with the request. The period specified in paragraph (2) may be extended only by the United States District Court for the District of Columbia upon an application of the Commission under subsection (i) of this section.

(d) Additional information

Before the expiration of the period specified in subsection (c)(1) of this section, the Commission may request from the person filing the agreement any additional information and documentary material it deems necessary to make the determinations required by this section.

(e) Request for expedited approval

The Commission may, upon request of the filing party, shorten the review period specified in subsection (c) of this section, but in no event to a date less than 14 days after notice of the filing of the agreement is published in the Federal Register.

(f) Term of agreements

The Commission may not limit the effectiveness of an agreement to a fixed term.

(g) Substantially anticompetitive agreements

If, at any time after the filing or effective date of an agreement, the Commission determines that the agreement is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost, it may, after notice to the person filing the agreement, seek appropriate injunctive relief under subsection (h) of this section.

(h) Injunctive relief

The Commission may, upon making the determination specified in subsection (g) of this section, bring suit in the United States District Court for the District of Columbia to enjoin operation of the agreement. The court may issue a temporary restraining order or preliminary injunction and, upon a showing that the agreement is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost, may enter a permanent injunction. In a suit under this subsection, the burden of proof is on the Commission. The court may not allow a third party to intervene with respect to a claim under this subsection.

(i) Compliance with informational needs

If a person filing an agreement, or an officer, director, partner, agent, or employee thereof, fails substantially to comply with a request for the submission of additional information or documentary material within the period specified in subsection (c) of this section, the United States District Court for the District of Columbia, at the request of the Commission--

(1) may order compliance;

(2) shall extend the period specified in subsection (c)(2) of this section until there has been substantial compliance; and

(3) may grant such other equitable relief as the court in its discretion determines necessary or appropriate.

(j) Nondisclosure of submitted material

Except for an agreement filed under section 1704 of this title, information and documentary

material filed with the Commission under section 1704 or 1705 of this title is exempt from disclosure under section 552 of Title 5 and may not be made public except as may be relevant to an administrative or judicial action or proceeding. This section does not prevent disclosure to either body of Congress or to a duly authorized committee or subcommittee of Congress.

(k) Representation

Upon notice to the Attorney General, the Commission may represent itself in district court proceedings under subsections (h) and (i) of this section and section 1710(h) of this title.

With the approval of the Attorney General, the Commission may represent itself in proceedings in the United States Courts of Appeal under subsections (h) and (i) of this section and section 1710(h) of this title.

(Pub.L. 98-237, § 6, Mar. 20, 1984, 98 Stat. 72.)

§ 1706. Exemption from antitrust laws

(a) In general

The antitrust laws do not apply to--

(1) any agreement that has been filed under section 1704 of this title and is effective under section 1704(d) or section 1705 of this title, or is exempt under section 1715 of this title from any requirement of this chapter;

(2) any activity or agreement within the scope of this chapter, whether permitted under or prohibited by this chapter, undertaken or entered into with a reasonable basis to conclude that (A) it is pursuant to an agreement on file with the Commission and in effect when the activity took place, or (B) it is exempt under section 1715 of this title from any filing requirement of this chapter;

(3) any agreement or activity that relates to transportation services within or between foreign countries, whether or not via the United States, unless that agreement or activity has a direct, substantial, and reasonably foreseeable effect on the commerce of the United States;

(4) any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade;

(5) any agreement or activity to provide or furnish wharfage, dock, warehouse, or other terminal facilities outside the United States; or

(6) subject to section 1719(e)(2) of this title, any agreement, modification, or cancellation approved by the Commission before the effective date of this chapter under section 814 of this title, or permitted under section 813a of this title, and any properly published tariff, rate, fare, or charge, classification, rule, or regulation explanatory thereof implementing that agreement, modification, or cancellation.

(b) Exceptions

This chapter does not extend antitrust immunity --

(1) to any agreement with or among air carriers, rail carriers, motor carriers, or common carriers by water not subject to this chapter with respect to transportation within the United States;

(2) to any discussion or agreement among common carriers that are subject to this chapter regarding the inland divisions (as opposed to the inland portions) of through rates within the United States; or

(3) to any agreement among common carriers subject to this chapter to establish, operate, or maintain a marine terminal in the United States.

(c) Limitations

(1) Any determination by an agency or court that results in the denial or removal of the immunity to the antitrust laws set forth in subsection (a) of this section shall not remove or alter the antitrust immunity for the period before the determination.

(2) No person may recover damages under section 15 of Title 15, or obtain injunctive relief under section 26 of Title 15, for conduct prohibited by this chapter.

(Pub.L. 98-237, § 7, Mar. 20, 1984, 98 Stat. 73.)

§ 1709. Prohibited acts

(a) In general

No person may--

(1) knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or by any other unjust or unfair device or means obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise be applicable;

(2) operate under an agreement required to be filed under section 1704 of this title that has not become effective under section 1705 of this title or that has been rejected, disapproved, or canceled; or

(3) operate under an agreement required to be filed under section 1704 of this title except in accordance with the terms of the agreement or any modifications made by the Commission to the agreement.

(b) Common carriers

No common carrier, either alone or in conjunction with any other person, directly or indirectly, may--

(1) charge, demand, collect, or receive greater, less, or different compensation for the transportation of property or for any service in connection therewith than the rates and charges that are shown in its tariffs or service contracts;

(2) rebate, refund, or remit in any manner, or by any device, any portion of its rates except in accordance with its tariffs or service contracts;

(3) extend or deny to any person any privilege, concession, equipment, or facility except in accordance with its tariffs or service contracts;

(4) allow any person to obtain transportation for property at less than the rates or charges established by the carrier in its tariff or service contract by means of false billing, false classification, false weighing, false measurement, or by any other unjust or unfair device or means;

(5) retaliate against any shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason;

(6) except for service contracts, engage in any unfair or unjustly discriminatory practice in the matter of--

(A) rates;

(B) cargo classifications;

(C) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage;

(D) the loading and landing of freight; or

(E) the adjustment and settlement of claims;

(7) employ any fighting ship;

(8) offer or pay any deferred rebates;

(9) use a loyalty contract, except in conformity with the antitrust laws;

(10) demand, charge, or collect any rate or charge that is unjustly discriminatory between shippers or ports;

(11) except for service contracts, make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever;

(12) subject any particular person, locality, or

description of traffic to an unreasonable refusal to deal or any undue or unreasonable prejudice or disadvantage in any respect whatsoever;

(13) refuse to negotiate with a shippers' association;

(14) knowingly and willfully accept cargo from or transport cargo for the account of a non-vessel-operating common carrier that does not have a tariff and a bond, insurance, or other surety as required by sections 1707 and 1721 of this title;

(15) knowingly and willfully enter into a service contract with a non-vessel-operating common carrier or in which a non-vessel-operating common carrier is listed as an affiliate that does not have a tariff and a bond, insurance, or other surety as required by sections 1707 and 1721 of this title; or

(16) knowingly disclose, offer, solicit, or receive any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to a common carrier without the consent of the shipper or consignee if that information--

(A) may be used to the detriment or prejudice of the shipper or consignee;

(B) may improperly disclose its business transaction to a competitor; or

(C) may be used to the detriment or prejudice of any common carrier.

Nothing in paragraph (16) shall be construed to prevent providing such information, in response to legal process, to the United States, or to an independent neutral body operating within the scope of its authority to fulfill the policing obligations of the parties to an agreement effective under this chapter. Nor shall it be prohibited for any ocean common carrier that is a party to a conference agreement approved under this chapter, or any receiver, trustee, lessee, agent, or employee of that carrier, or any other person authorized by that carrier to receive information, to give information to the conference or any person, firm, corporation, or agency designated by the conference, or to prevent the conference or its designee from soliciting or receiving information for the purpose of determining whether a shipper or consignee has breached an agreement with the conference or its member lines or for the purpose of determining whether a member of the conference has breached the conference agreement, or for the purpose of compiling statistics of cargo movement, but the use of such information for any other purpose prohibited by this chapter or any other chapter is prohibited.

(c) Concerted action

No conference or group of two or more common carriers may--

(1) boycott or take any other concerted action resulting in an unreasonable refusal to deal;

(2) engage in conduct that unreasonably restricts the use of intermodal services or technological innovations;

(3) engage in any predatory practice designed to eliminate the participation, or deny the entry, in a particular trade of a common carrier not a member of the conference, a group of common carriers, an ocean tramp, or a bulk carrier;

(4) negotiate with a nonocean carrier or group of nonocean carriers (for example, truck, rail, or air operators) on any matter relating to rates or services provided to ocean common carriers within the United States by those nonocean carriers: Provided, That this paragraph does not prohibit the setting and publishing of a joint through rate by a conference, joint venture, or an association of ocean common carriers;

(5) deny in the export foreign commerce of the United States compensation to an ocean freight forwarder or limit that compensation to less than a reasonable amount; or

(6) allocate shippers among specific carriers that are parties to the agreement or prohibit a

carrier that is a party to the agreement from soliciting cargo from a particular shipper, except as otherwise required by the law of the United States or the importing or exporting country, or as agreed to by a shipper in a service contract.

(d) Common carriers, ocean freight forwarders, and marine terminal operators

(1) No common carrier, ocean freight forwarder, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

(2) No marine terminal operator may agree with another marine terminal operator or with a common carrier to boycott, or unreasonably discriminate in the provision of terminal services to, any common carrier or ocean tramp.

(3) The prohibitions in subsection (b)(11), (12), and (16) of this section apply to marine terminal operators.

(e) Joint ventures

For purposes of this section, a joint venture or consortium of two or more common carriers but operated as a single entity shall be treated as a single common carrier.

(Pub.L. 98-237, § 10, Mar. 20, 1984, 98 Stat. 77; Pub.L. 101-595, Title VII, § 710(c), Nov. 16, 1990, 104 Stat. 2997; Pub.L. 102-251, Title II, § 201(b), Mar. 9, 1992, 106 Stat. 60.)